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Supreme Court of the United States

OCTOBER TERM, 1946

No. 705

Kenneth Tressler,
Petitioner

vs.

Ada A. Tressler, Shriver B. Tressler and
Ruth Westerberg, as Receiver
Respondents

PETITION FOR REHEARING

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, GREETING:

Your petitioner, Kenneth Tressler respectfully shows unto the Court that on November 20, 1946 he duly filed a Petition for Writ of Certiorari to the Supreme Court of Florida, and said petition was by Order dated December 23, 1946 denied.

Petitioner respectfully petitions this Honorable Court for a rehearing and reconsideration of said Pe-

tition for Writ of Certiorari, and for grounds thereof petitioner respectfully says:

1. That due process of law was not followed in the State court in that valid jurisdiction over the subject matter of the action and over the defendant Shriver B. Tressler was not obtained.

2. That petitioner's property was taken from him solely for the purpose of paying support to Ada Tressler under support Orders which were each null and void, said Orders having been entered without jurisdiction over the subject matter of the action and over the person of the defendant husband.

3. That petitioner's property was taken from him by decree of the State Court for the purpose of paying support to Ada Tressler, petitioner's step-mother, six months after dissolution of the marriage bonds and with knowledge thereof.

4. Petitioner pleaded the valid and unimpeached final decree of divorce granted petitioner's father against Ada Tressler, and the State Court denied petitioner the right to rely upon said final decree in defense of his property.

5. The State Court did not enjoin Shriver B. Tressler from proceeding with his action for divorce in Nevada, but merely enjoined the personal service of Nevada process within the jurisdiction of the Florida court, said action by the Florida Court was a nullity in that any process of the Nevada Court personally served beyond the territorial jurisdiction of Nevada would not constitute due process.

6. Upon entry of the Final Decree of divorce in Nevada dissolving the bonds of matrimony between Shriver Bert Tressler and Ada Tressler, the duty to provide support to Ada Tressler ceased, and the duty of impeaching the validity of said final decree devolved upon said Ada Tressler if she wished to avoid said final decree.

7. Lack of jurisdiction by the Florida Court over the subject matter of the action for "alimony unconnected with divorce" and over the main defendant, the husband, the real party in interest, is apparent upon the face of the record.

8. Petitioner was denied the right to attack the jurisdiction of the Florida Court over the action prior and subsequent to entry of decree pro confesso against him.

9. Equal protection of the laws was denied petitioner in that under the laws of the State of Florida the Courts are not empowered to decree a lien for alimony upon property even of a husband.

10. The State Court permitted Ada Tressler to allege one form of action in her pleadings for permanent alimony and received her proof under an entirely different form of action for maintenance and contribution (support) without requiring any amendment of her pleadings or notice of such change in issues to be given to the defendants.

11. The allegata and probata did not correspond.

12. No notice of application for appointment of a

Receiver was given to the owner of said property taken into receivership, or to the alleged owner of said property.

13. No bond was required to be given to indemnify the non-resident property owner for the taking of his property.

14. The pleadings attempted to allege a cause of action under Section 65.09 Florida Statutes, 1941 for permanent alimony, suit money and attorneys fees, and required to be predicated upon a ground of divorce under Section 65.04 Florida Statutes, 1941, but the Bill failed to allege jurisdictional residence of nirety days prior to suit, and also failed to allege any particular ground of divorce to support a decree for permanent alimony.

15. The pleadings attempted to allege a cause of action for permanent alimony under Section 65.09 Florida Statutes, 1941 and the chancellor determined that said action was upon said statute where causes of divorce are relied upon, yet permitted plaintiff to offer her proof under Section 65.10 Florida Statutes, 1941 for maintenance and contribution only.

16. Section 65.10 Florida Statutes, 1941 does not provide for payment of suit money or attorneys fees, and the Orders entered awarding temporary alimony each included suit money and attorneys fees, although not provided for by statute Section 65.10, supra under which said cause was allowed to proceed.

17. The Florida Court denied full faith and credit to the valid and unimpeached final decree of divorce granted Shriver Bert Tressler by the Nevada court and obtained upon valid constructive service of process.

18. The taking of petitioner's property after entry of the final decree of divorce for the purpose of paying support to the divorced wife, and the refusal of the Florida court to accord full faith and credit to said final decree, and the refusal of the Florida court to dissolve the receivership after the final decree of divorce was pleaded, was a denial of full faith and credit to said unimpeached final decree and the taking of petitioner's property without due process of law, and a denial of the equal protection of the laws.

19. Respondents rely upon Kiplinger v. Kiplinger, 147 Fla. 243, 2 So. (2d) 870, as authority to support Ada Tressler's action, in the Kiplinger case supra, the pleadings were amended prior to appearance date to state a cause of action for maintenance and contribution, while in the instant case the pleadings attempt to state a case under Section 65.09 Florida Statutes, 1941 for permanent alimony, and at no time have the pleadings been amended to state a case for maintenance or contribution, yet the proof was offered upon such case.

20. Failure to allege and prove jurisdictional residence in Florida was fatal to plaintiff's cause of action for permanent alimony.

21. The proof did not support the case laid in the pleadings and no decree should have been entered in favor of plaintiff.

22. Plaintiff's entire proof has been offered and her case completed and no amendment of her pleadings can now be made for to do so would change the issues stated in the pleadings relied upon.

DUE PROCESS OF LAW WAS NOT HAD

The Florida court lacked jurisdiction over the action for "alimony unconnected with divorce" and over the person of the defendant husband. Unless the Florida court had valid jurisdiction to enter a binding order or decree against the husband awarding support to Ada Tressler, no right of action accrued to Ada Tressler to impress a trust upon the property of petitioner.

LACK OF JURISDICTION OVER SUBJECT MATTER

The action commenced by Ada Tressler was entitled "Bill for Alimony Unconnected with Divorce" (Tr. 1,). The published constructive process described the form of action as being "a suit for alimony unconnected with divorce and for a declaratory decree" (Tr. 81). The prayer of the Bill sought a decree for temporary and permanent alimony, suit money and attorneys fees. (Tr. 19).

Such form of action can only be maintained under Section 65.09 Florida Statutes, 1941, which provides as follows:

> "65.09 Alimony unconnected with divorce.—
> If any of the causes of divorce set forth in § 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such **temporary and permanent alimony and suit money** as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife." (Italics supplied)

In construing this statute the Supreme Court of Florida in Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156, 158, stated as follows:

> "1. Where a suit for alimony is brought under section 1933 General Statutes, 1906, predicated upon the existence of a ground of divorce, the complaint should allege and prove two years residence in this state before filing of the bill, and also the existence of the marital relation between the complainant and the defendant, and also a ground of divorce under the statute in favor of the complainant. * * *"

At the time the Mariscano v. Mariscano decision was rendered the required jurisdictional residence to maintain an action based upon a ground of divorce in Florida was two years. The required jurisdictional residence is now ninety (90) days under Section 65.02 Florida Statutes, 1941, which provides as follows:

> "65.02 Residence required
> In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before filing of the bill of complaint."

Regarding the maintenance of an action for permanent alimony based upon a cause of divorce, Kooman's Florida Chancery Pleading and Practice, pages 554-555, Section 243, states as follows:

> "The wife's residence in this state for the statutory period is a jurisdictional prerequisite to the maintenance of a suit for alimony predicated upon the existence of a cause of divorce because, in the absence of such residence, no cause for divorce can properly be said to exist in her favor under the Florida statutes."

Citing Miller v. Miller, 33 Fla. 453, 15 So. 222, 24 L.R.A. 137, Donnelly v. Donnelly, 39 Fla. 229, 22 So. 648; Warren v. Warren, 73 Fla. 764, 75 So. 35, L.R.A. 1917E, 490.

In the instant case Ada Tressler did not allege jurisdictional residence of ninety days in the State of Florida prior to filing the Bill, (Tr. 1), and did not allege any cause of divorce under Section 65.04 Florida Statutes, 1941, to support the allegations of the Bill for permanent alimony. (Tr. 1-20, 35-36, 39-41).

The pleadings were at no time amended to state a cause of action for "alimony unconnected with divorce" in accordance with the requirements of the statute, Section 65.09 supra, and the pleadings were not amended to state a cause of action for maintenance and contribution (Support) under Section 65.10 Florida Statutes, 1941.

At time of taking Ada Tressler's testimony and after she had failed to prove jurisdictional residence within

the State of Florida for ninety days, the Chancellor inquired as to the nature of her cause of action. (Tr. 175). The chancellor determined that the cause of action was upon the statute (65.09) where a ground of divorce was relied upon. The chancellor stated: (Tr. 175)

> "The Court: Maybe you have misconstrued your action, that you are mistaken; it is not on the separate maintenance statute unconnected with divorce.

Despite this finding by the chancellor, plaintiff was not required to amend her pleadings and was permitted to offer her proof under Section 65.10 Florida Statutes, 1941 for maintenance and contribution, rather than under Section 65.09 Florida Statutes, 1941 for "alimony unconnected with divorce" as alleged in the Bill and published constructive process. (Tr. 1, 81,).

The issues stated in the pleadings were for permanent alimony. Only under Section 65.09 supra, where cause for divorce exists can a wife seek permanent alimony, and then only after allegation and proof of jurisdictional residence and allegation and proof of a ground of divorce under Section 65.04 Florida Statutes, 1941.

In order to circumvent the defects apparent upon the face of the bill as to lack of jurisdiction, plaintiffs in their objections to the Petition for Writ of Certiorari cite and rely upon the case of Kiplinger v. Kiplinger, 147 Fla. 243, 2 So. (2d) 870, (Respondent's Brief pages 17-18). Said decision does not control the case at bar. In the Kiplinger case supra, plaintiff amended her

pleadings prior to the appearance date and placed the issues squarely under the maintenance and contribution statute, then known as Chapter 4989 Compiled General Laws of Florida, 1927.

In the opinion of the Florida Supreme Court in Kiplinger v. Kiplinger, supra, 2 So. (2d) 870, 871, it was stated:

> "The bill of complaint filed December 3rd, 1940, was predicated on Sections 4988 and 4989 C.G.L. On December 28, 1940, the bill of complaint was amended and thereby eliminated all allegations under or reference to Section 4988, and the bill as amended rested solely under the provisions of Section 4989 * * *"

Section 4989 C. G. L. is the same as Section 65.10 Florida Statutes, 1941 and is the statute whereunder maintenance and contribution (support) can be obtained without the necessity of alleging or proving jurisdictional residence. In the instant case the pleadings were under Section 4988 C.G.L. or Section 65.09 Florida Statutes, 1941 where grounds of divorce exist, and any action for permanent alimony under said statute requires allegation and proof of jurisdictional residence as well as a ground of divorce.

In the instant case no amendment of the pleadings were made to state a case under the separate maintenance and contribution statute, but the proof was received by the chancellor under said statute, although the chancellor had determined that the pleadings stated or rather attempted to state a case where a ground of divorce exists. Such act on the part of the chancellor

was directly contrary to the decision of the Supreme Court of Florida rendered in Preston v. Preston, 116 Fla. 246, 157 So. 197, and cited and relied upon by petitioner in his brief, pages 25-26.

Only the case made by the pleadings can be taken as confessed by the defendants. The duty of proving the case laid in the pleadings rests upon the plaintiff. The proof offered did not support the case alleged for "alimony unconnected with divorce" for permanent alimony.

In Kooman's Florida Chancery Pleading and Practice, page 171, Section 85, the following is stated:

> "However, a decree pro confesso determines nothing except as to the facts alleged in the bill. It does not admit conclusions of law, facts not well pleaded, or forced inferences. Nor does it admit facts which the law will not permit to be confessed on the part of the particular defendant, for such facts, if provable at all, must be established by competent evidence. And a decree pro confesso does not aid or supplement a bill which does not state a good cause of action, and it is not to be taken as an admission of the equity of the bill. The court can grant no relief, notwithstanding the entry of a decree pro confesso, where the plaintiff's own uncontradicted statement demonstrates a want of equity in his prayer. And the defendant has a right to attack the sufficiency of the bill of complaint to state a case against him even after the entry of such a decree. Likewise, a decree pro confesso does not bind a defendant as to matters not properly adjudicated in the suit."

After entry of decree pro confesso against Kenneth Tressler said defendant filed his motion to vacate and set aside all orders and decrees entered in said action because of lack of jurisdiction over the subject matter of the suit and over the person of the defendant Shriver B. Tressler. (Tr. 324-326). Said motion was denied and stricken. (Tr. 401-403), although the jurisdictional defects of failure to allege jurisdictional residence or a ground of divorce are apparent upon the face of the record. (Tr. 1-20)

In order to circumvent the lack of jurisdictional allegations in the bill as to the subject matter of said action the Respondents in their Objections filed herein, pages 19-20, quote as authority for their contention that they are still privileged to amend their bill, Kooman's Florida Chancery Pleading and Practice, page 265. Respondents purposely omitted the pertinent language used by the author which controls the case at bar. Petitioner here cites the author and italicizes the pertinent portions omitted in the brief of Respondents:

In Kooman's Florida Chancery Pleading and Practice, page 265, Section 119, it is stated as follows:

> " * * * Even upon the final hearing, when it clearly appears from the evidence that the plaintiff has a case which entitles him to relief, but which by reason of some defect or omission in the allegations of the bill is not brought fairly within the issues, he will generally be permitted to amend the bill and adapt its allegations to the case as proved. **But when such an amendment would change the issue,**

> **or introduce new issues, or materially vary the grounds of relief, it is not generally permissible.**
>
> Pleadings may be amended even after an appeal has been taken or decided. Thus, where the appellate court has decided that the plaintiff is entitled to no relief on the facts alleged by him, the plaintiff may amend to introduce new facts which would change equitable issues already decided. **But the plaintiff cannot, by amendment after an appeal, depart from the cause of action originally brought.** * * *"

It is respectfully submitted that to permit Ada Tressler after entry of decree pro confesso against the defendants under pleadings stating one cause of action, to now amend her pleadings, after all of plaintiff's proof has been taken, and after an appeal, to state a cause of action for support to conform to the kind of proof offered, would be contrary to law, and contrary to due process.

In the recent case of McCullough v. McCullough, —— Fla. ——, 23 So. (2d) 139, 141, the plaintiff alleged a cause for divorce in the bill but offered proof under a different form of action for divorce, and attempted to amend his pleadings to conform to the proof offered after the testimony had been taken. The Supreme Court of Florida reversed the final decree of divorce so entered, and in the opinion stated:

> "(2,3,) Amendments to meet the proof are generally held not to be allowable if they change the theory of the case or the cause of action * * *"

Other cases supporting this view are cited by petitioner in his brief filed herein, pages 28.

Ada Tressler's action was for permanent alimony predicated upon the existence of a ground of divorce under Section 65.09 Florida Statutes, 1941 for "alimony unconnected with divorce". The bill failed to allege a cause of action under the statute. The plaintiff failed to allege or prove jurisdictional residence and failed to allege any ground of divorce as a predicate for obtaining permanent alimony allowed by said statute.

Ada Tressler completed her proof against her husband on June 23, 1945, (Tr. 245) and against Kenneth Tressler on December 5, 1945, (Tr. 456). No amendments of the pleadings were made to conform to the proof offered. Plaintiff failed to prove the case laid in her pleadings, the allegata and probata did not coincide. Kellogg v. Kellogg, 93 Fla. 261, 111 So. 637, 638, (Petitioners brief page 28). The Florida court was not empowered to enter any valid orders or decree in said cause for it lacked jurisdiction over the subject matter of the action.

Unless the orders awarding alimony, suit money and attorneys fees were based upon valid jurisdiction over the subject matter and over the person of the defendant husband, no right of action ever arose in Ada Tressler to attempt to impress a trust upon the property of Kenneth Tressler for the purpose of payment of alimony. Ada Tressler did not contribute any funds whatever to the purchase of the property made for Kenneth Tressler by his father, and Ada Tressler, having been married to petitioner's father only six

months, did not contribute any services in earnings or accumulating the funds used in making said purchases for the dependent son, Kenneth Tressler.

The property of Kenneth Tressler was taken from him without due process of law.

Bill cannot be filed under one statute and subsequent proceedings had under another. Peters v. Ten Eyck Corp. 125 Fla. 388, 169 So. 865; where this is done order allowing temporary alimony is void. Preston v. Preston, 116 Fla. 246, 157 So. 197.

FLORIDA COURT LACKED JURICDICTION OVER HUSBAND

Jurisdiction was attempted to be acquired by the Florida Court by constructive service of process, over the person of the defendant husband, Shriver B. Tressler.

The first constructive process attempted by sworn statement and Notice to Appear dated March 13, 1945 was quashed by the chancellor. (Tr. 83-84). Hearing upon said Motion to quash was had on May 1, 1945. (Tr. 79).

After the hearing had on May 1, 1945 Thomas M. Lockhart Esquire attorney for Ada Tressler made inquiry of J. A. Fitzsimmons as to the residence of Shriver B. Tressler and Kenneth Tressler, and said Thomas M. Lockhart was advised that Shriver B. Tressler and Kenneth Tressler were each residing in Reno, Nevada. (Tr. 133, 146).

Despite this knowledge imparted to plaintiff's counsel said Thomas M. Lockhart, Esquire did on May 2, 1945 make and filed a sworn statement wherein he alleged under oath that Shriver B. Tressler was a resident of the State of Florida and that he was concealing himself in order that personal service of process could not be made upon him. (Tr. 80-82). Nowhere in said sworn statement was it alleged in what county, city, town, village or hamlet within the State of Florida the alleged residence of Shriver B. Tressler was situate.

Only five days later, on May 7th, 1945 Shriver B. Tressler filed his sworn bill of complaint for divorce against Ada Zoeller Tressler in Reno, Nevada, and alleged that he had been a bona fide resident of and domiciled in the State of Nevada for more than six weeks prior to May 7th, 1945. (Tr. 151-153). Ada Tressler offered this sworn bill of complaint in evidence in the Florida action. Its allegations directly contradict the sworn statement of Thomas M. Lockhart as to the residence of the defendant husband Shriver B. Tressler. (151-153, 80-82).

Based upon the sworn allegations of residence in Nevada a final decree of divorce was granted Shriver B. Tressler by the Nevada court on July 17, 1945 against Ada Zoeller Tressler upon the ground of extreme cruelty. (Tr. 318-322). Extreme cruelty is a ground of divorce in Florida.

Ada Tressler had actual knowledge that Shriver B. Tressler had left the State of Florida in the early part of March, 1945 and had met and conversed with Mrs.

Anna Angel, mother of Ada Tressler in Clarksburg, West Virginia on March 17, 1945 and visited her home in Pittsburgh, Pa. on March 19, 1945. (Tr. 69).

Although plaintiff had actual knowledge that Shriver B. Tressler was residing in Reno, Nevada on May 2, 1945 Ada Tressler did not make any attempt to determine his residence in said State and did not attempt to serve him with process in the State of Nevada.

The facts of residence of Shriver B. Tressler for more than six weeks prior to May 7th, 1945 in the State of Nevada became res adjudicata upon entry of the final decree of divorce on July 17, 1945.

The chancellor in the Florida action prior to entry of decree pro confesso against Shriver B. Tressler had actual knowledge of the commencement of the action by him in Nevada and had actual knowledge of the sworn bill of complaint stating that he had resided in said State of Nevada for more than six weeks prior to May 7th, 1945. The chancellor admitted said Bill of Complaint for divorce filed in Nevada in evidence on June 4, 1945. (Tr. 142, 151). The decree pro confesso was not entered until June 5, 1945 and that was based upon alleged residence in Florida on May 2, 1945. (R. 80).

In the Florida action the chancellor on June 4, 1945 permanently enjoined Shriver B. Tressler from serving Ada Tressler personally with any process issued out of any court of the State of Nevada within the jurisdiction of the Florida court. (Tr. 135).

The Florida court did not enjoin or attempt to enjoin the prosecution of the action for divorce by Shriver B. Tressler in Nevada. The injunction order issued by the Florida court was an absurdity in that it was not necessary to make any personal service upon Ada Tressler in the Nevada action, as the published constructive service of process was binding upon her. (Tr. 313-321).

The attempts to make personal service of a copy of the Bill of Complaint for divorce filed in the Nevada court was to impart actual knowledge of the pendency of said action to Ada Tressler.

That Ada Tressler had actual knowledge of the pendency of the action for divorce filed by Shriver Bert Tressler in Nevada is reflected by the record herein in the following manner. (1) on May 18, 1945 she filed a petition in the Florida court wherein she alleged the pendency of the action for divorce in Reno, Nevada brought by Shriver B. Tressler. (Tr. 87). (2) on May 24, 1945 filed a supplemental petition alleging that a copy of summons and a copy of the Bill of Complaint in the Nevada action for divorce had been attempted to be served upon her. (Tr. 121-124). (3) Ada Tressler employed attorneys in Nevada in connection with the divorce action filed by Shriver B. Tressler and sought an allowance of counsel fees in the Florida action for said Nevada attorneys. (Tr. 242, 196). The Florida court included an allowance for her Nevada counsel in the Order awarding temporary alimony dated June 28, 1945. (Tr. 262).

Despite the employment of Nevada counsel for purposes of the divorce action commenced by Shriver B.

Tressler, and despite the allowance made to Ada Tressler by the Florida court to compensate her Nevada attorneys, said Ada Tressler did not appear or defend the divorce action although the Nevada court had jurisdiction of the subject matter of the action for divorce in a proper bill, and proof thereof, but said Nevada court also had valid jurisdiction of the person of Ada Zoeller Tressler served by valid constructive service of process by publication and proof thereof. (Tr. 313-321).

It is clearly apparent from the record that the Florida court did not have jurisdiction over the person of Shriver B. Tressler under the attempted constructive service of process made against him by Notice to Appear dated May 2, 1945 based upon a sworn statement of the same date wherein it was alleged that his residence was in the State of Florida but that he was concealing himself so that personal process could not be served upon him (Tr. 80-82).

In order to circumvent the clear lack of jurisdiction over the person of the defendant Shriver B. Tressler under the attempted service of process upon him dated May 2, 1945, Respondents in their objections filed to petitioners application for Writ of Certiorari, allege as follows: "Decree pro confesso was entered against the defendant Shriver B. Tressler on the 17th day of April, 1945 (Tr. 73)." This statement appears at page 8 of Respondents Objections filed herein.

Respondents failed to call to this Honorable Court's attention that the chancellor on May 1, 1945 had sustained a motion to quash the Notice to Appear dated

March 13, 1945 upon which said decree pro confesso was entered, and that as a result plantiff sought entire new process against both non-resident defendants, Shriver B. Tressler and Kenneth Tressler by obtaining complete new constructive process by publication on May 2, 1945. (Tr 80-82).

Plaintiff's counsel knew only too well that the first process attempted was utterly void in that it did not conform to the requirements of the constructive service statutes. In particular it failed to describe the lands sought to be proceeded against. (Sec. 48.08 F. S. A.)

If plaintiff Ada Tressler relies upon the decree pro confesso entered against Shriver B. Tressler on April 13, 1945 as a basis of the jurisdiction of the Florida court over him and said property, then it is quite apparent that the Florida court lacked jurisdiction.

Section 48.08 Florida Statutes, 1941 regulating the contents of the published Notice to Appear requires among other things that the description of real property proceeded against be contained in the published Notice. This was not done in the Notice to Appear dated March 13, 1945 under which the decree pro confesso was entered against Shriver B. Tressler. (Tr. 62-63). The chancellor quashed this service. (Tr. 83-84)

When new process was applied for the decree pro confesso theretofore entered against Shriver B. Tressler on April 16, 1945 was abandoned, and it became incumbent upon plaintiff to make diligent search and inquiry to determine the residence of Shriver B. Tress-

ler on May 2, 1945. Although plaintiff well knew that Shriver B. Tressler had left the State of Florida, and was informed that he was residing in Reno, Nevada, plaintiff alleged that he was a resident of Florida and concealing himself therein so that personal process could not be served upon him. Such conduct did not meet the requirements of the constructive service statutes of Florida, and did not impart jurisdiction of the Florida over the defendant husband. Due process of law was not had.

PETITIONER'S PROPERTY WAS TAKEN UNLAWFULLY

Although Kenneth Tressler was denied the right to attack the jurisdiction of the Florida court over his person and property, and he was denied the right to be heard in the cause, the case made by the plaintiff did not justify the Florida court in taking his property from him.

Plaintiff Ada Tressler regarding the $45,000.00 Maxwell Court Apartments, testified as follows: (Tr. 180)

> "Mr. Tressler and I discussed it. He said he was going to buy the Maxwell Apartments for a living for his son, giving me the understanding that he would duplicate the same for me in case of his death."
> "Yes, I saw the contract. He had bought that in Kenneth's name and I knew it was in Kenneth's name, but it was bought with the understanding that he would buy the Tarpon River Apartments and include my name in the deeds, so that in case of his death I would be taken care of.

Plaintiff's sister Sylvia Zoeller testified as follows: (Tr. 219).

> "* * * he took us to the beach one afternoon and when we came home from the beach he took us over to the Maxwell Court Apartments, and he said 'I am planning on buying this in Kenneth's name.' So nothing was said about it until we got home, and he said, 'Well, that is all right. I will buy an apartment for you later on'. He said 'I want to take care of you. I will buy you some sort of apartment, it will be a business for you, just as I have told you I would,—if anything happens to me, you will be taken care of.' * * *"

Plaintiff's witness and co-respondent herein Ruth Westerberg testified as follows: (Tr. 103).

> "Q. Now, all your dealings that you had about these properties was between Shriver B. Tressler and you up to Monday when he gave you these instructions, you didn't know anything about Kenneth Tressler, did you in the transaction?
>
> A. Oh yes, I knew that the Maxwell apartments belonged to Kenneth.
>
> Q. You mean you know that he had made a deed to Kenneth and the old deed was torn up?
> The Court: That wasn't the Maxwell—
> Witness: A. Yes, I knew the second,—the property was all in Kenneth's name. Mr. and Mrs. Tressler had both spoken about Kenneth having the Maxwell Apartments.

Plaintiff's witness, N. B. Cheaney, Esquire, the attorney that represented Shriver B. Tressler in the

purchases of the properties in Fort Lauderdale, Florida, testified as follows: (Tr. 198-199)

> "Q. Do you know why the defendant, Shriver B. Tressler after purchasing and paying for this property, the Maxwell property, directed your abstract corporation by letter dated January 22, 1945, to have the deed to said property made to Kenneth Tressler?
> * * * A. Mr. Tressler stated to me that the reason he deeded the title to this property in the name of his son was that his son was afflicted as a result of an operation and was incompetent to earn his own living fully and that he desired to buy these properties as a means of income for him."

In the face of all this testimony given before the chancellor and all upon the case made by the plaintiff, the chancellor took all of the property purchased for Kenneth Tressler away from him and impressed a trust thereon, in order to provide a means of enforcing the awards of "temporary alimony, suit money, and attorneys fees pendente lite" to Ada Tressler, in an action over which the Florida court did not have jurisdiction of the subject matter or over the person of the defendant husband, and refused to permit Kenneth Tressler to be heard in said cause, either to attack the jurisdiction of the Florida court or to be heard in defense of his property rights.

In view of the foregoing testimony, no defense was needed by him as to the Maxwell Apartments valued at $45,000.00 yet the Florida court took this property from him also. Such act was arbitrary, oppressive and unconstitutional.

FULL FAITH AND CREDIT DENIED NEVADA DIVORCE DECREE

Prior to any testimony having been taken in the cause as to the defendant Kenneth Tressler, and prior to any finding made by the Florida Court, Kenneth Tressler filed a motion to dissolve receivership, discharge receiver, cancel Lis Pendens and for an accounting. (Tr. 327). Attached to said motion and made a part thereof was an exemplified copy of the final decree of divorce entered by the Nevada court on July 17, 1945 dissolving the bonds of matrimony between Shriver Bert Tressler and Ada Zoeller Tressler. The Florida court struck said motion. (Tr. 401-403).

The chancellor had previously refused to admit in evidence an exemplified copy of the divorce proceedings had in Nevada. (Tr. 397).

The jurisdiction of the Florida court while originally invoked in an action upon which a ground of divorce was required to be relied upon to recover permanent alimony, said action was permitted to be maintained as a mere action for maintenance and contribution (support). (Tr. 1-20, 175).

Upon entry of the final decree of divorce in Nevada the duty to provide support to Ada Tressler as a wife ceased and if she wished to continue to receive support as the alleged wife of Shriver B. Tressler she was required to make a direct attack upon the validity of the final decree of divorce. This was not and has not been done by Ada Tressler in any jurisdiction.

In Esenwein v. Commonwealth of Pennsylvania, ex rel. May H. Esenwein, 325 U. S. 279, 280, this Honorable Court said:

> "The Full Faith andd Credit Clause placed the Pennsylvania courts under duty to accord prima facie validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another state. * * *"

In your opinion rendered on rehearing in the case of Williams v. North Carolina, 325 U. S. 226, 233-234, it was stated as follows:

> " * * * The burden of undermining the verity which the Nevada decree imports rests heavily upon the assailant. * * *".

In the same opinion, 325 U. S. 226, 229-230, the following is stated:

> "The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of Williams v. North Carolina, 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 A. L. R. 1273, supra, the jurisdictional requirements of domicil is freed from confusing refinements about 'matrimonial domicil' see Davis v. Davis, 305 U. S. 32, 41, 83 L. Ed. 26, 30, 59 S. Ct. 3, 118 A. L. R. 1518, and the like. Divorce like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every considera-

> tion of policy makes it desirable that the effect should be the same wherever the question arises.
>
> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. * * *".

In the instant case, both the defendant wife in the divorce proceedings and the State of Florida were possessed of actual knowledge of the pendency of the action for divorce in Nevada. Neither party to the marriage contract were citizens of the State of Florida and said State was not the matrimonial domicil of origin of the marriage contract. Ada Tressler had ample notice both actual, and constructive, and she had an opportunity to present her contentions, even as to lack of jurisdiction in the Nevada court. Failing to do so, she should now be estopped, however, the Florida court should have recognized that the final decree created a new status and accorded said final decree at least prima facie validity and it was admissible in evidence, as against the claim of Ada Tressler to receive further support out of the property of Kenneth Tressler, and said defendant had a right to plead and rely upon said final decree of divorce as terminating the right of Ada Tressler to have and recover support as the alleged wife of Shriver B. Tressler.

In Durlacher v. Durlacher, 35 Fed. Supp. 1005, 1006-1007, the District Court stated as follows:

> " (2, 3,) It is the right of any citizen of any State of the United States to change his or

her residence to any other State of the Union and become a citizen thereof. The law is well settled that when a husband changes his residence and citizenship to another state and while such resident and citizen obtains a decree of divorce therein pursuant to the laws of the State of his adoption, that such decree dissolves the marital relation and, hence, terminates the legal effect of any prior decision of any court awarding a judgment or decree of separate maintenance.

Chirgwin v. Chirgwin, 26 Cal. App. 2d. 506, 79 P. 2d 772; Cardinale v. Cardinale, 8 Cal. 2d. 762, 68 P. 2d. 351; Herrick v. Herrick, 55 Nev. 59, 25 P. 2d. 378; Simpson v. Simpson, 21 Cal. App. 150, 131 P. 99; McCormick v. McCormick, 82 Kan. 31, 107 P. 546; McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929; Harrison & Saunders v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521; 6 A. L. R. 1517, 30 C. J. 1076."

While the cited case was reversed on appeal to the Circuit Court of Appeals, 123 Fed. 2d. 70, and petition for Writ of Certiorari was denied by this Honorable Court, 315 U. S. 805, the reasoning for reversal was based upon the decision of Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, which decision was expressly overruled by this Court in Williams v. North Carolina, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, and adhered to on rehearing.

The ennunciation of the law of the land as stated in Durlacher v. Durlacher, supra, is in conformity with the principle announced and adopted by this Court in Williams v. North Carolina, 325 U. S. 225, 229-230,

quoted herein. Only where it can be shown that valid jurisdiction was not had or obtained, or that the decree of divorce was obtained through fraud, will any court refuse full faith and credit to the final decree of divorce of a sister State.

In the subsequent case of Bassett v. Bassett, 51 Fed. Supp. 544, 546, the District Court of Nevada reached a similar conclusion as in the Durlacher v. Durlacher case supra.

In Bassett v. Bassett, supra the District Court stated as follows:

> " * * * The gist of the decision in the Williams case, supra, which deals directly with Nevada divorce decrees and their status in other states, is so far as it is applicable to the case at bar is concisely stated in syllabus 6 which reads: 'Under the Full Faith and Credit Clause and the Act of May 26, 1790, where a decree of divorce is granted by a state to one who is at the time bona fide domiciled therein, is rendered in a proceeding complying with due process, such decree, if valid under the laws of that state, is binding upon the courts of other states, including the State in which the marriage was performed, and where the other party to the marriage was still domiciled when the divorce was decreed.'
>
> "* * * In the case of Herrick v. Herrick, 55 Nev. 59, at page 68, 25 P. 2d. 378, at page 380, the Supreme Court, said 'The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance.' The Court in that case was dealing with a California decree of separate maintenance."

While this Honorable Court in its decision on rehearing in Williams v. North Carolina, 325 U. S. 226, did recede from its holding that all such decrees are binding upon every other State, insofar as it pertained to the State of domicillary origin in its sovereign capacity, such action was predicated upon the ground that the State of North Carolina was not bound by the decree for the reason that said State was not a party to the divorce proceeding, however, this Honorable Court reiterated that the parties to said proceeding were bound, if they had been afforded appropriate opportunity to present their contentions, and held that this also applies to jurisdictional questions.

Ada Tressler was accorded due process in the Nevada divorce proceedings and had ample opportunity to present her contentions, including jurisdictional questions, she failed to do so. It is respectfully submitted that the duty to provide support ceased upon entry of the final decree of divorce on July 17, 1945, and said decree is entitled to full faith and credit by the courts of the State of Florida as against Ada Tressler.

WHEREFORE, in order that justice may be done in the premises, and that the property rights of the petitioner, Kenneth Tressler may be secured to him and he be granted the protection of his constitutional guarantees, petitioner does respectfully pray that this Honorable Court will reconsider the Order dated December 23, 1946, denying the Petition for Writ of Certiorari filed herein by petitioner, and that this petition for rehearing shall be granted, and upon reconsideration of the petition for issuance of Writ

of Certiorari, that the said Petition shall be granted, and a review of the final decree dated January 7, 1946, entered by the Circuit Court of Broward County, Florida, and the affirmance thereof made by the Supreme Court of Florida, by Orders dated July 2, 1946, and on rehearing, dated July 31, 1946, shall be had and each be reversed.

And your Petitioner will ever pray.

JOSEPH A. FITZSIMMONS,
Attorney for Petitioner
Kenneth Tressler.

CERTIFICATE

State of Florida }
Broward County } ss.

The undersigned as counsel for petitioner does hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

JOSEPH A. FITZSIMMONS

Sworn and subscribed
before me this 13th day
of January A. D. 1947.
GEO. R. MORGAN,
Notary Public, State of
Florida at Large.
My commission expires: Nov. 21, 1947.

APPENDIX

FLORIDA CONSTRUCTIVE SERVICE STATUTES

Section 48.04 Florida Statutes, 1941—

"4804 Sworn statement, natural person as defendant

The sworn statement of the plaintiff, his agent or attorney, for service of process by publication against a natural person shall show:

(1). That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and

(2). Whether such person is over or under the age of twenty-one years, if his age is known, or that his age is unknown; and,

(3). In addition to the above, that the residence of such person is, either:

(a) Unknown to the affiant; or,

(b) In some state or country other than the State of Florida, stating said residence if known; or,

(c) In the State of Florida, but that he, (i) has been absent from the state for more than sixty days next preceding the making of the sworn statement, or (ii) conceals himself so that process cannot be personally served upon him, and that affiant believes that there is no person in the State of Florida upon whom service of process would bind said absent or concealed defendant. Laws 1941 c. 20452, § 4."

Section 48.08 Florida Statutes, 1941—

"48.08 Notice to appear, form.
Upon filing the sworn statement, and otherwise complying with the foregoing requirements, the plaintiff shall be entitled to have issued by the clerk or judge, not later than sixty days after the filing of the sworn statement, a notice to appear, which notice shall set forth:

(1). The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim, by, through, under or against a known party, which may be described as 'all parties claiming interests by, through, under or against (name of known party)' and a description of all other unknown defendants which may be described as 'all parties having or claiming to have any right, title or interest in the property herein described';

(2). The nature of the suit or proceeding in short and simple terms (but neglect to do so shall not be construed as jurisdictional);
(3). The name of the court in which the suit or proceedings were instituted and an abbreviated title of the case;

(4). The description of real property, if any, proceeded against| Lows 1941, c. 20452, §8."

ALIMONY STATUTES OF FLORIDA

Section 65.09 Alimony unconnected with divorce.

"65.09 Alimony unconnected with divorce.
If any of the causes of divorce set forth in

§ 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife."

Section 65.10 Alimony unconnected with causes of divorce.

"65.10 Alimony unconnected with causes of divorce.

If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance and contribution."

GROUNDS OF DIVORCE IN FLORIDA

Section 65.04 Florida Statutes, 1941.

"65.04 Grounds for divorce

No divorce shall be granted unless one of the following facts shall appear:

(1). That the parties are within the degrees prohibited by law.

(2). That the defendant is naturally impotent.

(3). That the defendant has been guilty of adultery.

If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procurea divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

(4). Extreme cruelty by defendant to complainant.

(5). Habitual indulgence by defendant in violent and ungovernable temper.

(6). Habitual intemperance of defendant.

(7). Willful, obstinate and continued desertion of complainant by defendant for one year.

(8). That the defendant has obtained a divorce from the complainant in any other state or country.

(9). That either party had a husband or wife living at the time of the marriage sought to be annulled."

JURISDICTIONAL RESIDENCE REQUIRED

Section 65.02 Florida Statutes, 1941.

"65.02 Residence required.

In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before filing of the bill of complaint."